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ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសជ
Case File/Dossier No. 002/19-09-2007/ECCC/TC

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Before: Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

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DECISION ON OBJECTIONS TO DOCUMENTS PROPOSED TO BE PUT BEFORE THE CHAMBER ON THE CO-PROSECUTORS' ANNEXES A1-A5 AND TO DOCUMENTS CITED IN PARAGRAPHS OF THE CLOSING ORDER RELEVANT TO THE FIRST TWO TRIAL SEGMENTS OF CASE 002/01

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1. INTRODUCTION

1. The Trial Chamber is seised of the Co-Prosecutors' oral motion to put before the Chamber all documents contained in their Annexes A1-A5.¹ The Trial Chamber is also seised of objections to a number of these documents, as well as those cited in the footnotes to the Closing Order paragraphs related to the trial segments in Case 002/01 concerned with i) historical background, and ii) administrative and communications structures, and some elements of the roles of the Accused.² The present decision considers all these objections and determines whether the above documents satisfy the criteria to be put before the Chamber pursuant to Internal Rule 87, including all of the criteria set forth in Internal Rule 87(3).³

2. PROCEDURAL HISTORY

2.1. Documents cited in relevant footnotes to the Closing Order

2. On 17 November 2011, the Trial Chamber announced that subject to any order to the contrary, the documents and other sources referenced in the footnotes to the portions of the Closing Order read out in court at the commencement of each trial topic would be deemed to be put before the Chamber pursuant to Internal Rule 87.⁴ In its oral decision of 26 January 2012, the Trial Chamber clarified that as the Co-Investigating Judges assessed all documents

¹ T., 19 January 2012, p. 68; *see* Co-Prosecutors' Response to the Trial Chamber's request for Documents relating to the First Phase of Trial, E109/4, 22 July 2011; Annex 1: Accused Statements, E109/4.1; Annex 2: CPK Publications and Directives, E109/4.2; Annex 3: CPK Meeting Minutes, E109/4.3; Annex 4: DK Communications, E109/4.4; Annex 5: DK Media and Public Statements, E109/4.5.

² T., 16-19 January 2012 ("First Document Hearing"); T., 16 February 2012 ("Second Document Hearing").

³ For related decisions, *see* Decision on NUON Chea's Request for a Rule 35 Investigation Regarding Inconsistencies in the Audio and Written Records of OCIJ Witness Interviews, E142/3, 13 March 2012 ("Audio Recordings Decisions"); Scheduling of oral hearing on documents (16-19 January 2012), E159, 11 January 2012, p. 2 (indicating that the Chamber did not foresee ruling on the majority of individual objections where these are essentially representative of broad categories of objections already ruled on, or unsubstantiated) and Scheduling of oral hearing on documents, E170, 9 February 2012, para. 6 (indicating that court time scheduled for adversarial argument in relation to specified categories of documents is envisaged as an alternative to the filing of written objections). In addition, two forthcoming decisions address the Co-Prosecutors' request to put before the Chamber witness statements and other documents in the absence of in-court testimony of the authors of these documents ("Witness Statements Decision") as well as the parties' requests to place new documents in the case file ("New Documents Decision").

⁴ Response to issues raised by parties in advance of trial and scheduling of informal meeting with Senior Legal Officer on 18 November 2011, E141, 17 November 2011, pp. 2-3; *see also* Scheduling of oral hearing on documents (16-19 January 2012), E159, 11 January 2012 ("First Document Hearing Scheduling Order"), para. 5; and Next group of witnesses, Civil Parties and Experts to be heard in Case 002/01, E172, 17 February 2012 (indicating that Closing Order paragraphs relevant to the trial segments concerning administrative and communications structures, and some elements of the roles of the accused will be read out in court on 12 March 2012). On 5 December 2011 and 12 March 2012 respectively, the historical background paragraphs of the Closing Order were read out in court and put before the Chamber (T., 5 December 2011, pp. 10-26 and T., 12 March 2012, pp. 3-33, 35-56).

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placed on the Case File for relevance and accorded some probative value to the evidence cited in the Closing Order (and as the Closing Order was subject to appeal to the Pre-Trial Chamber), the documents cited in the portions of the Closing Order relevant to each trial segment in Case 002/01 were entitled to a presumption of relevance and reliability (including authenticity). Those documents cited in portions relevant to the initial trial segments in Case 002/01 were consequently deemed to be relevant and reliable (including authentic) on a *prima facie* basis (in addition to satisfying the other requirements of Internal Rule 87(3)) and accorded an E3 number.⁵

3. The parties were advised that opportunity for adversarial argument would be provided should the parties seek to rebut this presumption of relevance and reliability in relation to any specific document in the above category. During the hearings of 16-19 January 2012 (“First Document Hearing”), the parties were given an opportunity to rebut this presumption in relation to documents cited in the footnotes to the historical background section of the Closing Order.⁶ On 16 February 2012 (“Second Document Hearing”), the parties were given a similar opportunity of rebuttal in relation to the documents cited in the footnotes to the paragraphs of the Closing Order relevant to communication and administrative structures and some elements of the roles of the Accused.⁷

2.2. Documents listed in Co-Prosecutors’ Annexes A1-A5

4. On 22 July 2011, the Co-Prosecutors filed 21 Annexes (A1-A21) of documents they intended to put before the Trial Chamber during the first segments of the trial in Case 002/01.⁸ The first ten of these annexes (A1-A10) contain contemporaneous Democratic

⁵ T. 26 January 2012, pp. 85-88; *see also* Trial Chamber response to portions of E114, E114/1, E131/1/9, E131/6, E136 and E158, E162, 31 January 2012 (“Summary of Oral Decision”), para. 3 (noting that this only applied to documents cited in the Closing Order and not to other documents in the Case File).

⁶ *See* Response to issues raised by parties in advance of trial and scheduling of informal meeting with Senior Legal Officer on 18 November 2011, E141, 17 November 2011, p. 2 (indicating paras 18-32, 862-868, 994-1000, 1091, 1126-1130, 1577-1580, 1585-1588, and 1598-1600 of the Closing Order as relevant to this hearing).

⁷ Scheduling of oral hearing on documents (13-16 February 2012), E170, 9 February 2012, para. 5 (indicating paras 33-112, 869-872, 880-892, 1001-1015, 1131-1144 and 1147-1150 as relevant to this segment).

⁸ Co-Prosecutors’ Response to the Trial Chamber’s Request for Documents Relating to the First Phase of Trial, E109/4, 22 July 2011. This response identifies documents relevant to the first segments of the trial from those documents identified in the Co-Prosecutors original document lists (*see* Co-Prosecutors’ Rule 80(3) Trial Document List, E9/31, 19 April 2011). Annex 21 contains the list of documents not on the Case File and was not subsequently included in the Co-Prosecutors list of 22 July 2011. Annex 21 will be addressed in the forthcoming New Documents Decision.

Kampuchea era documents.⁹ Annexes A11-A21 contain a variety of other types of documents the Co-Prosecutors intend to put before the Chamber.¹⁰

5. Having previously ordered all parties to file document lists by April and June 2011, on 25 October 2011, the Trial Chamber ordered the parties to indicate whether they had objections to the documents proposed by the other parties, and the basis for these objections, no later than 5 January 2012.¹¹ The Defence teams filed their objections on 5 January 2012.¹²

6. On 11 January 2012, the Trial Chamber announced its intention to put before it the contemporaneous Democratic Kampuchea (“DK”) documents listed in the Co-Prosecutors’ Annexes A1-A10.¹³ In order to provide the parties the opportunity to identify their objections to any documents contained in Annexes A1-A5 with greater particularity, and to more fully elaborate the basis for these objections, the Trial Chamber scheduled a hearing for 17-19 January 2012.¹⁴ The Chamber indicated that objections to documents in the Co-Prosecutors’ other Annexes, as well as documents proposed by the other parties, would be heard from 12 March 2012 onwards.¹⁵

2.3. General issues concerning provenance of documents relevant to Case 002/01

7. On 11 January 2012, the Trial Chamber notified the parties that if particular documents raised genuine issues concerning provenance, reliability or chain of custody, the Trial Chamber would summon and hear a limited number of witnesses to address them.¹⁶ During

⁹ Annex 1: Accused Statements; Annex 2: CPK Publications and Directives; Annex 3: CPK Meeting Minutes; Annex 4: DK Communications; Annex 5: DK Media and Public Statements; Annex 6: DK Biographies; Annex 7: DK Commerce Records; Annex 8: Tram Kak District Records; Annex 9: S-21 Prisoner Records; Annex 10: S-21 Confessions (E109/4.1-4.10).

¹⁰ Annex 11: CF1 Trial Transcripts; Annex 12: Witness Statements; Annex 13: Complaints; Annex 14: Site Identification Reports; Annex 15: Maps and Photographs; Annex 16: Audio and Video; Annex 17: International Communications; Annex 18: International Media Reports; Annex 19: Academic Articles, Analytical Reports and Books; Annex 20: Rogatory Reports (*see* Annexes 1-10, E109/4.11-4.20).

¹¹ Witness Lists for early trial segments, deadline for filing of admissibility challenges to documents and exhibits, and response to Motion E109/5, E131/1, 25 October 2011, p. 2.

¹² Objection to the Admissibility of the Other Parties Remaining Document Lists for the First Four Segments of the First Trial, E131/1/11, 5 January 2012; Objections, Observations, and Notifications Regarding Various Documents to be Put Before the Trial Chamber, E131/1/9, 14 November 2011; IENG Sary’s Objections to the Admission of Certain OCP Documents for the First Four Trial Segments, E131/1/10, 5 January 2012; Document Objections and Further Submissions Pursuant to Rule 92, E131/1/12, 5 January 2012.

¹³ First Document Hearing Scheduling Order, para. 8.

¹⁴ First Document Hearing Scheduling Order, para. 8.

¹⁵ Further oral hearing on documents (commencing 12 March 2012), E172/1, 24 February 2012 (as amended by Updated memorandum for next document hearing (12-19 March 2012), E172/5, 2 March 2012). Objections to documents in Annexes A11-A21 shall be addressed in due course.

¹⁶ First Document Hearing Scheduling Order, para. 8, footnote 4. CHHANG Youk and VANTHAN Dara appeared on the Co-Prosecutors’ list of witnesses.

the First Document Hearing, all Defence teams requested that the Director of the Documentation Centre of Cambodia (“DC-Cam”) CHHANG Youk be called to testify as to the chain of custody and authenticity of documents on the Case File originating from DC-Cam.¹⁷ As a significant portion of documents on the Case File relevant to Case 002/01 were provided to the ECCC by DC-Cam, the Chamber called both VANTHAN Dara (the DC-Cam Deputy Director) and CHHANG Youk to address generally the provenance and authenticity of documents originating from the DC-Cam archives.¹⁸

3. SUBMISSIONS

8. Despite the Chamber’s Order of 17 January 2011 and consequent filing of document lists by the Co-Prosecutors in April and July 2011, all Defence teams submitted that they had insufficient time to formulate specific objections to documents suggested by the Co-Prosecutors.¹⁹ The IENG Sary Defence nonetheless filed on 5 January 2012 objections to each of the documents identified by the Co-Prosecutors in Annexes A1-A20 (except Annex 7).²⁰ The NUON Chea Defence supported all objections made by the IENG Sary Defence, and raised additional objections in relation to certain categories of documents.²¹ The KHIEU Samphan Defence incorporated by reference its prior objections by category.²² All teams further availed themselves of the opportunity to object orally to certain documents and categories of documents during the First and Second Document Hearings.

3.1. Documents cited in relevant footnotes to the Closing Order

9. In relation to documents cited in the relevant portions of the Closing Order, the IENG Sary Defence objected to “the admission of any document which is not demonstratively

¹⁷ T., 16 January 2012, pp. 83-90, 94-95, 118-120, 128; T., 17 January 2012, pp. 13-14, 33-39, 59, 108-109.

¹⁸ T., 18 January 2012, pp. 30-31. The Co-Prosecutors later filed a list of all documents originating from DC-Cam (Co-Prosecutors’ Response to NUON Chea Defence Request for a List of Documents Provided by DC-Cam [...], E161, 23 January 2012; Annex A: Documents Received from the Documentation Centre of Cambodia [DC-CAM] that have been Included in Annexes 1 – 20 of the Co-Prosecutors’ Rule 80(3) First Phase Document List, E161.1, 23 January 2012.

¹⁹ Objection to the Admissibility of the Other Parties Remaining Document Lists for the First Four Segments of the First Trial, E131/1/11, 5 January 2012, paras 4-5; Objections, Observations, and Notifications Regarding Various Documents to be Put Before the Trial Chamber, E131/1/9, 14 November 2011, para. 20.

²⁰ IENG Sary’s Objections to the Admission of Certain OCP Documents for the First Four Trial Segments, E131/1/10, 5 January 2012 (including objections to all documents in these Annexes, except for those contained in Annexes 7 and 21, on grounds that Annex 7 comprises OCP documents from the first trial segment to which the Defence had already objected. Annex 21 is a list of new documents contained in the other Annexes A1-A20).

²¹ Document Objections and Further Submissions Pursuant to Rule 92, E131/1/12, 5 January 2012, para. 2.

²² Objection to the Admissibility of the Other Parties’ Remaining Document Lists for the First Four Segments of the First Trial, E131/1/11, 5 January 2012, para. 5.

authentic or shown to be authentic by the party seeking to introduce it".²³ He also opposes a number of these documents on grounds that:

- i. the probative value of the proposed evidence is outweighed by its prejudicial effect on the fairness of proceedings (in relation to approximately 34 documents);
- ii. the Accused has an absolute right to confront the source of information against him (103 documents);
- iii. certain documents are unreliable and unsuitable to prove the facts they purport to prove (82 documents); and
- iv. written records of witness interviews are not reliable as they do not necessarily provide an accurate representation of the witness' responses (47 documents) and may not be put before the Chamber if not available in all three languages (49 documents)²⁴.

10. The IENG Sary Defence further submits that documents cited in the Closing Order provided by Stephen Heder should not be put before the Chamber on grounds that as Mr Heder worked for the Co-Prosecutor in drafting the introductory submissions, and later for the Co-Investigating Judges in "confirming the introductory submission by his involvement in the preparation of the Closing Order".²⁵

11. KHIEU Samphan submits that clarifications are required regarding the chain of custody and content, authenticity and reliability of certain documents.²⁶ IENG Sary further objects to the admission of some books and articles, contending that books and articles should be given no weight unless more information as to authorship and provenance is provided.²⁷ KHIEU Samphan also contends that where portions of books are put to individuals giving evidence at trial, only those pages or excerpts can be considered to be before the Chamber.²⁸ The IENG

²³ IENG Sary's Objections to the Admission of Certain Documents Contained in the Footnotes of the Closing Order Paragraphs Read Out in Court, E156, 16 December 2011 ("IENG Sary Footnote Objections"), p. 1.

²⁴ Objections to all documents are individually identified by the IENG Sary Defence in the above terms in its Annex for IENG Sary's objections to the admission of certain documents contained in the footnotes of the Closing Order paragraphs read out in court, E156.2, 16 December 2011 ("IENG Sary Specific Footnote Objections"); *see also* IENG Sary's Response to the Co-Prosecutors' Motion which accompanied their Rule 80 Expert, Witness and Civil Party Lists, E9/4/1, 8 February 2011, para. 2.

²⁵ T., 16 February 2012, pp. 31-33.

²⁶ T., 16 February 2012, pp. 31, 49 (KHIEU Samphan) (referring to telegrams cited in the Closing Order, which the KHIEU Samphan Defence consider to be unreliable because no information is provided as to their chain of custody, particularly concerning the author of these telegrams); *see also* T., 16 February 2012, pp. 30-31 (IENG Sary) (arguing that commerce department telegrams should be given little weight unless witnesses are called to indicate how these telegrams were produced and circulated).

²⁷ T., 16 February 2012, p. 47 (IENG Sary).

²⁸ T. 16 January 2012, pp. 122-123 (KHIEU Samphan); *see also* KHIEU Samphan's "Motion in Response to the Numerous Difficulties Raised by Ms. Lamb's e-mail dated 2 February 2012" ("KHIEU Samphan Trial Management Motion"), E167, 17 February 2012, para. 17).

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Sary Defence submit that they must have the opportunity to cross-examine the authors of all relevant documents on the Case File before such documents may be admitted as evidence.²⁹

12. IENG Sary and KHIEU Samphan both contend that the statements of KAING Guek Eav *alias Duch* made during Case 001 should not be admitted unless this witness testifies under oath in Case 002.³⁰

13. The Co-Prosecutors respond that the 95 documents cited in the Closing Order and considered during the Second Document Hearing are presumed to be relevant, reliable and authentic. The Trial Chamber has already found that reports, journals or documentary films obtained from media sources, where relevant, have been regarded as documents that may be put before the Chamber. They submit that Mr Heder left their office before the introductory submission was written in the second quarter of 2007.³¹ Further, IENG Sary provides no factual basis to support the submission that the probative value of certain documents is outweighed by the risk of unfair prejudice or that certain documents are unsuitable to prove the facts they purport to prove. There is also no absolute right to summon any author of any document, and the rights of the Accused are adequately protected by the ability of the Defence to compare the tape recordings of witness interviews with the written statements and to raise inconsistencies, if any.³²

14. The Civil Parties agree that the authenticity and relevance of the documents cited in the Closing Order have been accepted by the Co-Investigating Judges.³³ They further submit that the Defence must demonstrate how the presumption of reliability that attach to these sources can be rebutted prior to excluding it.³⁴

3.2. Documents listed in the Co-Prosecutors' Annexes A1-A5

15. The Defence objects to the admission of documents listed in the Co-Prosecutors' Annexes A1-A5 on grounds that:

- i. the probative value of certain documents is outweighed by their prejudicial effect on the fairness of the proceedings (389 documents);

²⁹ T., 16 February 2012, pp. 30-31.

³⁰ T., 16 February 2012, p. 34, 57, 64; *see also* IENG Sary's Motion for all Statements of KAING Guek Eav *alias Duch* not to be Admitted as Evidence Unless Duch Appears in Court as a Witness and for Disclosure by the OCP and Trial Chamber of Duch's Untruthful Statements, E78, 26 April 2011.

³¹ T., 16 February 2012, p. 82.

³² T., 17 January 2012, pp. 7, 10 and 25.

³³ T., 16 February 2012, pp. 73-74, 78 and 85.

³⁴ T., 16 February 2012, pp. 82, 86.

- ii. transcripts of oral statements are unreliable if their original audio recording are not made available (304 documents);
- iii. the Accused has an absolute right to confront the author of documents or statements made against him (365 documents);
- iv. new documents must meet the test set out in Internal Rule 87(4) prior to being put before the Chamber (36 documents);
- v. a document must be considered unreliable if its author is unknown or if there is no chain of custody to determine its origins (5 documents);
- vi. documents produced outside of the temporal jurisdiction of the ECCC are irrelevant to the trial in Case 002/01 (119 documents);
- vii. certain documents are not available in all three languages and are therefore inadmissible (44 documents);
- viii. statements by Co-Accused during ECCC proceedings should not be put before the Chamber unless the Co-Prosecutor can sufficiently demonstrate the relevance of these documents (6 documents);
- ix. Internal Rule 87(3) requires the Co-Prosecutors to sufficiently demonstrate the authenticity, reliability and relevance of all documents (308 documents);
- x. certain documents are irrelevant to the topics for Case 002/01 (118 documents); and
- xi. confessions given under torture are inadmissible in judicial proceedings before the ECCC except against a person accused of torture as evidence that a statement was made (62 documents)³⁵.

16. In response, the Co-Prosecutors recall that on 19 April 2011, they provided notice to the parties of each document it deemed to be relevant, along with a description of those documents and their relevance to the various parts of the indictment.³⁶ In their submission of 23 December 2011, they further set out various indicia of reliability of the 978 documents on its later document list relevant to the first trial segments in Case 002/01. They submit that the majority of these 978 documents, which were grouped into numerous categories and encompassed all documents in Annexes A1-A20, are official documents created under the

³⁵ See IENG Sary's Objections to the Admission of Certain OCP Documents for the First Four Trial Segments, Annexes 1-5, E131/1/10.1-E131/1/10.5, 5 January 2012 ("IENG Sary Objections"); see also IENG Sary's Document and Exhibit List for the First Four Trial Topics, E109/6, 8 August 2011. The IENG Sary Defence further submits that in all cases, documents must be put to witnesses prior to their admission as evidence (IENG Sary Specific Footnote Objections; see also T., 19 January 2012, p. 103). IENG Sary and KHIEU Samphan submit that documents which are not in an official language of the ECCC should be translated and subject to further objections if necessary (T., 16 February 2012, p. 41, pp. 50-51). NUON Chea submits that many of the documents in the Co-Prosecutors' Annexes A1-A5 were irrelevant to the first trial in Case 002 (T., 19 January 2012, pp. 27-29 and T., 16 February 2012, p. 36).

³⁶ T., 19 January 2012, p. 50.

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supervision of the DK authorities.³⁷ The Co-Prosecutors further submit that these documents were obtained during the judicial investigation from DC-Cam, whose methods of documentary collection, processing and authentication were amply clarified by DC-Cam Director CHHANG Youk and are thus reliable.³⁸ The majority of the public statements or interviews of the Accused on the Co-Prosecutor's Document List are also contemporaneous records of events that occurred during the DK period and contain strong indicia of reliability and authenticity.³⁹ As such, all documents in these Annexes satisfy the criteria for admissibility set forth in Internal Rule 87(3).

3.3. Other related Defence Motions

17. NUON Chea also requests the Trial Chamber to order the Co-Prosecutors to obtain additional information from DC-Cam, on grounds that a party proposing documents for admission has a duty to provide the Chamber with relevant information pertaining to their authenticity, provenance and chain of custody, where such information is available.⁴⁰ In particular, he requests the disclosure of information contained in two DC-Cam database fields in order to clarify the provenance and chain of custody of the documents they describe.⁴¹ NUON Chea submits that his fair trial rights require the Chamber to seek these additional clarifications, as this information is relevant to the weight to be afforded these documents.⁴²

18. The Co-Prosecutors submit that a thorough inquiry as to the provenance and chain of custody of each individual document is not a precondition for its admissibility. Documents

³⁷ Co-Prosecutors' Rule 92 submission regarding indicia of reliability of the 978 documents listed in connection with those witnesses and experts who may be called during the first three weeks of trial, E158, 23 December 2011 ("Co-Prosecutors' Rule 92 Submission"), para. 2 (providing examples of various internal and external characteristics that may be relied on when assessing the provenance of documents and analysing them. Relevant internal characteristics include document markings, form, source/author, date of creation, contents, purpose and internal consistency, whereas external features include a document's authentication, identification, corroboration, discovery and custody).

³⁸ Co-Prosecutors' Rule 92 Submission, paras. 4-5.

³⁹ Co-Prosecutors' Rule 92 Submission, paras. 7-26, 37-50 (noting that Communist Party of Kampuchea ("CPK") publications in particular utilize distinct expressions associated with the CPK, contain consistent markings and possess a similar layout. In addition, witnesses have confirmed the authenticity of several editions of the Revolutionary Flag and other CPK documents; *see also* T., 15 December 2011, pp. 73-74).

⁴⁰ Further Submissions Relating to Request for Clarification of Provenance/Chain of Custody of DC-Cam Documents, E1/39.1/1, 9 February 2012 (NUON Chea DC-Cam Motion), paras 8, 16.

⁴¹ NUON Chea DC-Cam Motion, paras 2-5 and 15. The first of these databases, labeled "Source/provenance note (317)" is alleged to record information on the source of the item and its former/current owners. The second, entitled "note relating to copy being catalogued (316)", allegedly contains information as to whether DC-Cam possesses the original version of the document or a copy.

⁴² NUON Chea DC-Cam Motion, paras 6 and 14 (contending that as he is not thereby seeking to admit new evidence, but instead requesting clarification with regard to existing evidence, the NUON Chea Defence need not satisfy the requirements for new documents pursuant to Rule 87(4)).

need only satisfy a *prima facie* standard of relevance, reliability and authenticity, which the documents in question possess. DC-Cam provides an accessible, publicly available database or archive from which all parties were allowed to conduct inquiries and collect documents. Further, all the DC-Cam documents have been in the Case File for at least two to three years. The Defence therefore had ample opportunity to request these clarifications earlier and the present request risks unnecessarily prolonging proceedings.⁴³

19. On 6 February 2012, the KHIEU Samphan Defence further requested the Trial Chamber to direct DC-Cam to transfer the originals of all documents placed on the Case File to the ECCC and to clarify their chain of custody.⁴⁴ In response, the Co-Prosecutors submit that there is no legal requirement for the production of all original documents from DC-Cam at this stage of proceedings, that originals were consulted during the course of the judicial investigation and copies of them placed on the Case File, and that significant logistical and other difficulties would be entailed if required to store all DC-Cam document originals at the ECCC for the duration of the trial.⁴⁵

4. FINDINGS

4.1. Introduction

20. On 26 January 2012, the Trial Chamber clarified that all evidence cited in the portions of the Closing Order relevant to each trial segment in Case 002/01 was entitled to a presumption of relevance and reliability (including authenticity):⁴⁶

3. Internal Rule 67(3) requires the Co-Investigating Judges to review and evaluate documents to determine whether as a whole there is sufficient evidence to support the charges against the Accused. It follows that during the judicial investigation, the Co-Investigating Judges assessed all documents placed on the Case File for relevance, and accorded some probative value to the evidence cited in the Closing Order. The Closing Order was subject to appeal to the Pre-Trial Chamber. For these reasons, the Trial Chamber has accorded the documents cited in the Closing Order a presumption of relevance and reliability (including authenticity) and has given them an E3 number.

⁴³ T., 6 February 2012, pp. 85-87; *see also* Co-Prosecutors' Response to NUON Chea's Further Submissions Relating to Request for Clarification of Provenance/ Chain of Custody of DC-Cam Documents, E1/39.1/2, 24 February 2012.

⁴⁴ Motion for the Original Copies of Contemporaneous Documents to be Produced before the Chamber, E168, 6 February 2012, para. 17.

⁴⁵ Co-Prosecutors' Response to KHIEU Samphan's 'Requête aux Fins de Production à l'audience des Documents d'Époque en Original', E168/1, 20 February 2012, paras. 8-18.

⁴⁶ T. 26 January 2012, pp. 85-88; *see also* Trial Chamber response to portions of E114, E114/1, E131/1/9, E131/6, E136 and E158, E162, 31 January 2012 ("Summary of Oral Decision"), para. 3.



Documents that are on the Case File but are not found in the Closing Order have not been accorded this presumption.

21. The Chamber also made the following rulings relevant to the present decision:⁴⁷

4. Original documents are a preferred method of proof and will be accorded more weight than photocopies of documents. The fact that certain words within a document are illegible does not preclude putting it before the Chamber. Such issues are a matter of weight and shall not be considered when evaluating the requirements of Internal Rule 87(3).

5. Material such as analytical reports, books, documentary films, and media articles may be relevant and will not be excluded as a category. Its probative value, however, shall be determined by the Chamber in due course.

6. The ICTY and other international tribunals have adopted a practice that permits judges to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. This is not reflected in the ECCC legal framework, and is in any event unnecessary because professional judges have the ability to disregard unduly prejudicial evidence.

7. There is no procedural requirement before the ECCC to call witnesses with personal knowledge to authenticate documents on the Case File. Nonetheless, testimony as to chain of custody and provenance will assist the Chamber in assessing the weight to be attributed to particular documents.

8. The Trial Chamber has previously indicated that parties seeking the introduction of documents at trial bear the burden of ensuring their timely availability in all three official languages (E131/1). Some latitude will be granted by the Chamber where parties are precluded from doing so due to workload constraints of the ITU [Interpretation and Translation Unit] and when the relevant portions of the documents the parties intend to put before the Chamber and to use as the basis to question a witness or an Accused are available in at least one language that the Accused or the witness can understand. Alternatively, and where the relevant portion of a document in question is brief and can be easily translated in court, the Chamber may allow that portion of the document in question to be put to an Accused or witness.

9. As this issue continues to be raised by the parties, the Trial Chamber reiterates that evidence obtained through torture has limited uses. It reminds the parties of its memorandum E74 in Case 002 and its oral decisions in Case 001 of 20 and 28 May 2009.

22. Following this ruling, the Defence objections described in paragraphs 9(i) and 15(i)⁴⁸, 15(v) and paragraph 11 (concerning chain of custody in relation to telegrams)⁴⁹, 15(vii)⁵⁰,

⁴⁷ T. 26 January 2012, pp. 85-88; *see also* Trial Chamber response to portions of E114, E114/1, E131/1/9, E131/6, E136 and E158, E162, 31 January 2012 ("Summary of Oral Decision").

⁴⁸ Summary of Oral Decision, para. 6.

⁴⁹ Summary of Oral Decision, para. 7. As there is no requirement under the ECCC legal framework for evidence to be introduced through a witness, the absence of information as to the provenance and chain of custody of telegrams is an issue that goes to weight rather than admissibility. In any case, several telegram operators have been scheduled to testify during Case 002/01 (T., 19 January 2012, p. 10).

⁵⁰ Summary of Oral Decision, para. 8. Notwithstanding the burden on the party seeking to introduce a document to ensure its timely availability in all three official languages, the Trial Chamber has granted latitude in relation to the documents in the footnotes to the Closing Order and in the Co-Prosecutors' Annexes A1-A5

15(xi)⁵¹, and paragraph 11 (concerning books and articles)⁵² are consequently moot, as are those outlined in paragraphs 9(iv) and 15(ii)⁵³, 12⁵⁴, and 9(ii), which are addressed instead or in greater detail in a number of related or prior decisions of the Chamber. The objections in paragraphs 15(iii) and 15(iv) will be addressed in the forthcoming Written Statements Decision⁵⁵ and the New Documents Decision⁵⁶.

23. In relation to the remaining Defence objections, the Trial Chamber notes that the vast majority are generic objections to documents by category and do not identify the specific attributes of particular documents alleged to render them unreliable or otherwise inadmissible before the Chamber. The Chamber has nonetheless endeavoured to review all relevant objections, whether general or particularized. However, it recalls its notice to the parties that objections must be clearly identified and that absent sufficient particularity, only objections alleging that specific documents manifestly lack reliability or relevance will be entertained.⁵⁷ In consequence, the Chamber rejects the objection contained in paragraph 9(iii), on grounds that it fails to explain why the 82 documents in question are alleged to be unreliable or

referred to in paragraphs 9(iv) and 15(vii), which are unavailable in all three languages of the ECCC due to the Interpretation and Translation Unit's workload constraints precluding the timely production of translations (*see* T. 26 January 2012, p. 88).

⁵¹ Summary of Oral Decision, para. 9. The Trial Chamber has also previously clarified that evidence obtained through torture has only limited uses (*see e.g.* T. 26 January 2012, p. 88; T., 5 April 2011, pp. 96-97; T., 20 May 2009, p. 6 and T., 28 May 2009, pp. 7-9).

⁵² Summary of Oral Decision, para. 5.

⁵³ *See e.g.* Audio Recordings Decision, paras 6, 12 (explaining that OCIJ witness interviews are not verbatim transcripts, and that it is not mandatory for the Co-Investigating Judges to make an audio or video recording of interviews with witnesses or Civil Parties. The Chamber will entertain allegations of inconsistency between the audio recording and written records of interview only where these are identified by the moving party with sufficient particularity, and where they pertain to substantial discrepancies that have clear relevance to the trial); *see also* Trial Chamber Memorandum entitled Translation requests in support of NUON Chea Motion E142 and IENG Sary Letter to the Trial Chamber Senior Legal Officer of 11 December 2011 (E142/1), E142/2, 20 December 2011. In these objections, the IENG Sary Defence has not particularized alleged inaccuracies or inconsistencies in the written records of witness interviews and has provided no basis for why the entirety of each witness interview should be translated into all three languages of the ECCC. In general, allegations of discrepancy between written records of interview and audio recordings are relevant to the probative value to be accorded these written records and not to whether they may be put before the Chamber.

⁵⁴ *See* Trial Chamber response to Motions E67, E57, E56, E23, E59, E20, E33, E71 and E73 following Trial Management Meeting of 5 April 2011 (indicating that if summoned in Case 002, KAING Guek Eav *alias Duch* will be heard as a witness and thus required to swear an oath) and Next group of witnesses, Civil Parties and Experts to be heard in Case 002/01, E172, 17 February 2012 (indicating that KAING Guek Eav *alias Duch* will testify during the current trial session in Case 002/01).

⁵⁵ However, the Chamber notes its prior oral ruling in which it held that all written records of interviews of KAING Guek Eav made by the Co-Investigating Judges during the investigation in Case 002, or during the investigation in Case 001 and which have been placed on the Case File in 002, are considered put before the Chamber (*see* T., 3 April 2012, p. 65). Many of these written records of interviews also appear in the Co-Prosecutors' Annex 12.

⁵⁶ The Chamber has reviewed the new documents appearing in Annexes 1-5 and, as explained in the New Documents Decision, has found all except four documents to satisfy the requirements of the Internal Rules for placement on the Case File and putting before the Chamber. One of these four documents was rejected as irrelevant, whereas the other three are to date unavailable for review on the Shared Materials Drive.

⁵⁷ *See* First Document Hearing Scheduling Order, para. 2.

unsuitable to prove the facts they purport to prove. Subject to its finding in paragraph 34 of this decision, the objections identified in paragraphs 15 (viii), 15 (ix) and 15 (x) are similarly rejected due to their lack of specificity.

4.2. Objections concerning the provenance of DC-Cam documents

24. For the reasons that follow, the Chamber has rejected all Defence objections concerning the provenance of DC-Cam documents.

25. DC-Cam Deputy Director VANTHAN Dara testified that DC-Cam is an independent nonprofit organization whose mission is to collect and compile Khmer Rouge-era documents.⁵⁸ It receives documents from a variety of sources, including state institutions, the National Archives, the Royal Government of Cambodia, private organizations and personal donations.⁵⁹ When DC-Cam obtains documents or other material, it inquires about the source of the document, copies the document, and retains the original in a secure location. The document is then catalogued and entered into a database.⁶⁰ All documents received by DC-Cam are catalogued in the same manner, regardless of whether they might be inculpatory or not.⁶¹ All documents compiled and kept by DC-Cam are accessible to the public, with no restrictions placed on their use.⁶²

26. CHHANG Youk, the Director of DC-Cam, affirmed that documents received by DC-Cam undergo rigorous and carefully-controlled procedures designed to ensure accuracy.⁶³ To assess whether a document is original, staff evaluate the document's date, its overall condition and the language used.⁶⁴ To establish a document's authenticity, DC-Cam also examines its colour to estimate whether it is an old or a new document, and will identify its date and

⁵⁸ T., 23 January 2012 (VANTHAN Dara Peou), pp. 5, 11, 64, 67; T., 24 January 2012 (VANTHAN Dara Peou), p. 17 (the witness was trained in the collection, management and compilation of documentation in New South Wales, Australia and also received training in how to conduct criminal investigations in Ireland in 2000. He has worked for DC-Cam since 1995).

⁵⁹ T., 23 January 2012 (VANTHAN Dara Peou), p. 12.

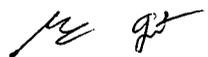
⁶⁰ T., 23 January 2012 (VANTHAN Dara Peou), pp. 6, 12-13.

⁶¹ T., 24 January 2012 (VANTHAN Dara Peou), pp. 84-85, 113 (rejecting the assertion of the NUON Chea Defence that DC-Cam did not carry out neutral historical research but instead tried to provide the basis for a trial by collecting inculpatory statements); *see also*, T., 2 February 2012 (CHHANG Youk), p. 74.

⁶² T., 23 January 2012 (VANTHAN Dara Peou), p. 30.

⁶³ T., 1 February 2012 (CHHANG Youk), p. 33 (the data is read, summarized and translated if necessary, and verified against other copies in order to ensure accuracy). The witness possesses a master's degree in political science and received training in documentation at Yale University (T., 1 February 2012, p. 5).

⁶⁴ T., 23 January 2012 (VANTHAN Dara Peou), pp. 11-12, 17-18, 68; T., 24 January 2012 (VANTHAN Dara Peou), pp. 51-52.



author.⁶⁵ Although DC-Cam does not undertake forensic testing of documents, they rely on staff with extensive experience, and have collaborated with national institutions such as the National Archives of Cambodia.⁶⁶

27. On request, DC-Cam will attempt to trace the origin of a document.⁶⁷ However, YOUK Chhang testified that none of the parties to Case 002 have made any requests to DC-Cam for original documents.⁶⁸ Further, the NUON Chea Defence admitted that they do not allege that DC-Cam had itself forged documents.⁶⁹ Although the Defence assert that DC-Cam was not sufficiently thorough in ascertaining the provenance and authenticity of documents, the testimony of VANTHAN Dara and YOUK Chhang was otherwise uncontested.

28. On the basis of the testimony of CHHANG Youk and VANTHAN Dara, the Trial Chamber considers the methodology used by DC-Cam in obtaining, archiving and preserving contemporaneous DK-era documents to be reliable. It therefore considers that contemporaneous DK-era documents originating from DC-Cam are entitled to a rebuttable presumption of *prima facie* relevance and reliability (including authenticity). Whilst information regarding provenance and chain of custody need not be provided in relation to individual documents proposed for admission before the Chamber, the Chamber is satisfied that the processes employed by DC-Cam provides no reasonable apprehension that documents originating from this source could have been subject to tampering, distortion or falsification.⁷⁰ The originals of all such documents are retained by DC-Cam and the Defence could have requested access to these documents where any genuine concern as to the accuracy of the copy contained on the Case File or as to the provenance or reliability of particular documents existed.⁷¹ The Chamber accordingly finds no basis to entertain either the request of the NUON

⁶⁵ T., 1 February 2012 (CHHANG Youk), p. 37 (indicating that the content and the language of documents are examined to determine if they bear the imprimatur of the Democratic Kampuchea period, and that the language used in the DK era documentation is distinctive.)

⁶⁶ T., 23 January 2012 (VANTHAN Dara Peou), pp. 11-12, 17-18, 68 (explaining that most DC-Cam staff involved in gathering and compiling documents work under the witness' supervision, whereas others are trained in Cambodia by experts from Yale and the University of New South Wales); *see also* T., 24 January 2012 (VANTHAN Dara Peou), pp. 51-52.

⁶⁷ T., 1 February 2012 (CHHANG Youk), p. 36.

⁶⁸ T., 1 February 2012 (CHHANG Youk), pp. 122-123.

⁶⁹ T., 2 February 2012, p. 88; *see also* T., 2 February 2012 p. 61 (indicating that YOUK Chhang has been helpful to the Defence in providing the NUON Chea team with information).

⁷⁰ T., 2 February 2012 (CHHANG Youk), pp. 19, 21, 36; T., 6 February 2012 (CHHANG Youk), pp. 107-108 (dismissing the possibility that documents in the DC-Cam archive could have been forged by others, noting that it would be a practical impossibility for someone to create over one million false documents, and excluding the possibility that Vietnamese experts could fabricate DK-era documentation, due to their volume and specialized character, including the fact that many documents were in the Khmer language).

⁷¹ *Cf.* IENG Sary Footnote Objections, p. 1.

Chea Defence for additional information stored on the DC-Cam databases or the KHIEU Samphan Defence to retain all DC-Cam original documents for the duration of the trial.

4.3. Remaining objections to documents cited in relevant footnotes to Closing Order and to Documents listed in the Co-Prosecutors' Annexes A1-A5

29. In relation to the IENG Sary and NUON Chea objection that approximately 119 documents in Annexes A1-A5 are inadmissible as they were produced outside the temporal jurisdiction of the ECCC (paragraph 15(vi)), the Chamber notes that it has previously granted the parties limited latitude to present evidence falling outside the ECCC temporal jurisdiction where it is relevant to establish background information or context.⁷² The Chamber rejects this objection on grounds that the Defence have provided no argument in support of the contention that this material is irrelevant to the trial in Case 002/01 and thus inadmissible pursuant to Internal Rule 87(3).

30. Despite their unavailability in all official ECCC languages, the Chamber has reviewed those documents referenced in paragraphs 15(vii) and 9(iv) and considers they are *prima facie* relevant and reliable (including authentic).⁷³ Although the parties are at liberty to raise material discrepancies between the various language versions of these documents once these translations are received, discrepancies between the various language versions of documents (or between audio recordings and written statements) shall generally be considered as relevant to the probative value and weight to be accorded to this evidence rather than to the question of whether it should be put before the Chamber pursuant to Internal Rule 87.⁷⁴

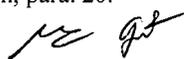
31. Concerning the Defence objections regarding the modalities of placing documents before the Chamber (paragraph 11), the Chamber finds no basis for the contention that documents may be put before the Chamber exclusively in connection with the testimony of a witness, Expert or Civil Party. Nor does the ECCC legal framework require the entirety of a document's contents to be discussed before considering it to have been put before the Chamber in accordance with Internal Rule 87(3).⁷⁵ To the contrary, Internal Rule 87(3) was amended to permit the "appropriate identification" of documents as an alternative to the extensive in-court reading of their contents, in order to ensure the efficiency of trial

⁷² Directive in advance of Initial Hearing concerning proposed witnesses, E93, 3 June 2010 (indicating background contextual issues outside the temporal jurisdiction of the ECCC may be heard when demonstrably relevant to matters within the ECCC's jurisdiction and the scope of the trial as determined by the Chamber).

⁷³ See footnote 49, above.

⁷⁴ See Audio Recordings Decision, paras 12-13.

⁷⁵ Cf. KHIEU Samphan's Trial Management Motion, para. 20.



proceedings.⁷⁶ No detriment is entailed for the Accused by this amendment, as the Defence are not precluded from objecting to any portion of a document proposed to be put before the Chamber by the Chamber or any party.

32. Finally, the Trial Chamber will determine in due course whether proposed expert Steven Heder will be summoned to appear before the Chamber for the purpose of authenticating those documents attributed to him in the relevant Closing Order footnotes.⁷⁷ In any case, the Trial Chamber will consider the objections of the IENG Sary Defence (paragraph 10) when assessing the weight to be accorded to any of these documents.

4.4. Documents without a presumption of relevance or reliability

33. Of the approximately 1100 documents appearing in the Co-Prosecutors' Annexes A1-A5, approximately 250 are documents which were neither obtained from the DC-Cam archives nor cited in the relevant Closing Order footnotes. Although these documents therefore do not enjoy a presumption of *prima facie* relevance and reliability, the Trial Chamber has nonetheless considered each of these documents (and all relevant objections) in light of the criteria in Internal Rule 87(3). The majority of these documents were found on review also to be *prima facie* relevant and reliable and have therefore been put before the Chamber pursuant to Internal Rule 87 and provided with an E3 classification.

34. The Trial Chamber has also declined to adopt a presumption of relevance and reliability (including authenticity) for all documents put before the Trial Chamber in Case 001 as suggested by the Co-Prosecutors.⁷⁸ Whilst indicating that these documents were then considered by the Trial Chamber to be reliable, this does not establish that these documents are relevant to Case 002/01. Nonetheless, the reliability accorded to these documents in Case 001 is one factor to be considered by the Trial Chamber in determining whether the requirements of Internal Rule 87 have been satisfied.

⁷⁶ Internal Rule 87(3), as amended on 11 September 2009, provides in relevant part that "Evidence from the Case File is considered put before the Chamber [...] if its content has been summarized, read out, or appropriately identified in court."

⁷⁷ The Chamber has not included this proposed expert in its provisional list of witnesses, Experts and Civil Parties to be called during the early segments of the trial in Case 002/01 (E131/1.1).

⁷⁸ T., 19 January 2012, p. 13.



4.5. Conclusion

35. Of all documents considered in this Decision, the Chamber has declined to place 13 before it. The Chamber has determined that 9 of these documents are both unreliable and irrelevant to the trial in Case 002/01 and one has been excluded for being illegible. The Chamber has, in addition, deferred its decision on 3 documents currently unavailable on the Shared Materials Drive in consequence of the New Documents Decision.

36. For ease of reference, the Chamber has listed all documents put before the Chamber in consequence of this decision in two Annexes, namely Annex A (pertaining to documents listed in the Closing Order footnotes) and Annex B (pertaining to documents listed in the Co-Prosecutors' Annexes A1-A5).

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

CONSIDERS all documents cited in the Closing Order paragraphs relevant to this decision to have been put before the Chamber, with the exception of the single illegible document referred to in paragraph 35, as identified in Annex A to this decision (E185.1);

FURTHER CONSIDERS those documents contained in the Co-Prosecutors' Annexes A1-A5 to have been put before the Chamber, with the exception of the 12 remaining documents referenced in paragraph 35, as identified in Annex B to this decision (E185.2);

DENIES the NUON Chea DC-Cam Motion's request for additional information (E1/39.1/1) and KHIEU Samphan's request that original copies of contemporaneous documents possessed by DC-Cam be produced before the Chamber and retained by the ECCC for the duration of the trial in Case 002 (E168), on grounds that no necessity has been demonstrated for either request; and

RECALLS that the probative value and thus weight to be accorded to all evidence put before the Chamber in consequence of this decision will be determined by the Chamber at the conclusion of the hearing of evidence in Case 002/01 and in connection with the verdict.

Phnom Penh, 9 April 2012
President of the Trial Chamber



[Handwritten signature]

Nil Nonn